FRED E. PAYNE
RANDY D. LEADER

IBLA 2000-5 Decided May 20, 2003

Appeals from a Record of Decision of the State Director, Utah, Bureau of Land Management, approving the Ferron Natural Gas Project. UT-070-99-1310-00.

Motion to dismiss denied; decision affirmed.

1. Administrative Procedure: Standing--Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Standing to Appeal

   A motion by BLM to dismiss an appeal of a natural gas development project by an overriding royalty interest holder in Federal oil and gas leases will be denied when the holder demonstrates that he is a party to the case and that design features of the approved project may preclude natural gas well development on tracts in which he holds an interest and potentially reduce overriding royalties received.

2. National Environmental Policy Act of 1969: Environmental Statements--Oil and Gas Leases: Drilling

   A BLM decision approving a natural gas development project which includes a buffer zone barring wells within ½-mile of active raptor nests, subject to modification of the buffer zone based on a site-specific analysis at the time an APD is filed, will be affirmed where it has a rational basis in the record and the appellant fails to demonstrate, by a preponderance of the evidence, that BLM did not give due consideration to all relevant factors.

APPEARANCES: Thomas W. Bachtell, Esq., and Michael S. Johnson, Esq., Salt Lake City, Utah, for Fred E. Payne; Randy D. Leader, pro se; John W. Steiger, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Fred E. Payne and Randy D. Leader have separately appealed from a July 6, 1999, Record of Decision (ROD) of the State Director, Utah, Bureau of Land Management (BLM), approving the "Ferron Natural Gas Project" (Project), UT-070-99-1310-00, a coal bed methane/natural gas development project in central Utah.

In June/July 1997, the Anadarko Petroleum Corporation and several oil and gas companies [1/] (hereinafter, collectively, Anadarko et al.) proposed the Project, which would involve the development of 353 natural gas wells, using 160-acre spacing, on various Federal, State, and private oil and gas leases situated in the 111,520-acre Castle Valley area of Carbon and Emery Counties, Utah. The wells were primarily intended to produce natural gas from coal seams in the Ferron Sandstone Member of the Mancos Shale Formation, underlying the leased lands. Development, which would encompass 285 new wells and 68 existing wells, was described as follows:

> Construction of the Ferron Natural Gas Project would begin during 1999. Generally, construction would be completed within five years (by the end of 2004). The production lifetime of the wells is expected to be about 20 years and final reclamation is expected to be completed during the two to three years following the end of production. Thus, the Ferron Natural Gas Project is expected to be completed around 2027.

(I Final Environmental Impact Statement (FEIS) at 2–3; [2/] see ROD at 3.) Of the new wells, a total of 130 would be drilled on Federal leases, which encompass about 44,240 acres of public land (as well as Federal mineral estates):

> [In the 18,350-acre North Area,] [f]orty-six wells [out of a total of 65] would be constructed on federal lands * * *. About nine wells

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[1/] In addition to Anadarko, the Project was proposed by Chandler and Associates, LLC (Chandler LLC), Texaco Exploration and Production Inc. (Texaco), and Questar Pipeline Company (Questar).

[2/] The Draft EIS (DEIS) and FEIS were issued in several volumes. Hence, they are cited by volume and page number, e.g. page number 1–1 of Volume 1 of the DEIS is cited as "I DEIS at 1–1."

> would be constructed annually on these federal lands from 1999 through 2003. * * * [In the 93,170-acre South Area,] 84 wells [out of a total of 220] would be drilled on federal lands * * *. About 17 wells would be constructed annually on these federal lands from 1999 through 2003.

(I FEIS at 2–6.) Each well would be drilled/completed over the course of from 8 to 20 days. Wells would be situated on a well pad ranging from 200 x 225 feet to 200 x 300 feet, which would encompass a well head, gas meter, separation equipment, and pumping unit.

Anadarko et al. also proposed the construction/upgrading and maintenance of about 202 miles of access roads and the construction, operation, and maintenance of pipelines for gathering/transporting natural gas and produced water from all of the well sites to 11 newly-constructed compressor stations, where the gas would be treated/compressed. The project also encompassed 285 new wells for disposal of produced water. In addition, they sought approval for the construction, operation, and maintenance of a 20-inch natural gas transmission pipeline, which would transport the gas approximately 27 miles from the Project area for sale and distribution.

In order to assess the potential significant environmental impacts of the proposed natural gas development project and alternatives thereto, as required by section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. § 4332(2)(C) (2000), BLM, together with the Forest Service, U.S. Department of Agriculture, and the Utah Division of Oil, Gas and Mining, prepared a Draft EIS dated September 21, 1998. [3/] In addition to the proposed action (Alternative 1), the alternatives included a modified version of the proposed action (Alternative 2) incorporating certain environmental protection measures identified during the scoping process, and a no-action alternative (Alternative 3). The Draft EIS was made available for public comment for a period of 55 days. 63 FR 53048 (Oct. 2, 1998). After a careful review of the public comments, which resulted in modifications of the Draft EIS, BLM issued its Final EIS on July 6, 1999. 64 FR 38004 (July 14, 1999).

In her July 1999 ROD, the State Director, relying on BLM's FEIS, approved the Project as modified in Alternative 2. She thus provided for the proposed natural gas

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[3/] The Forest Service participated in the preparation of the EIS as a cooperating agency, since a portion of the Project lands are situated in the Manti-La Sal National Forest. To the extent that the Project involves the drilling of natural gas wells and the construction of related facilities on National Forest lands, the Forest Service issued its own ROD.

development on public lands (and Federal mineral estates) within BLM's jurisdiction, subject to specified environmental protection measures: "This alternative allows for gas development while mitigating [environmental] impacts to an acceptable level." [4/] (ROD at 5.) It generally precludes wells and other long-term surface occupancy within ½-mile of any active raptor nest in the Project area, where that nest had been occupied within three years prior to the proposed activity. See ROD at 7, Appendix 1 at ¶ 24; I FEIS at 2–39. [5/] The State Director also provided that her approval of the Project would be in full force and effect on August 16, 1999, absent a stay of the effect of her decision by the Board. 64 FR at 38004. Since no stay request was filed, the decision went into effect on that date, thus allowing natural gas drilling and associated activity to occur.

Payne and Leader both appealed from the State Director's July 1999 ROD. We will first address Payne's appeal. In his statement of reasons (SOR) for appeal, Payne states that he is the holder of an overriding royalty interest in several Federal oil and gas leases within the Project area (Nos. UTU-18126, UTU-18897-A, UTU-18889-A, UTU-51015, and UTU-69402), which contain lands within ½-mile of active raptor nests. (SOR at 4, referring to Assignment of Overriding Royalty Interest, dated Nov. 25, 1997 (Ex. B attached to SOR), and II DEIS at Plate 3–8b (Raptor Nests – South Area).) He contends that BLM's decision to preclude well development and production within ½-mile of any active raptor nests, by adopting a year-long no surface occupancy buffer zone policy under Alternative 2, will economically injure him by preventing him from reaping the full economic benefit of these leases. He points out that this decision will potentially preclude gas development from an area of close to 502 acres surrounding each active nest, which means that, with 160-acre spacing, BLM is potentially preventing "four (4) or more well locations" in the case of each active raptor nest. (SOR at 4, citing Affidavit of Collis P. Chandler, III, dated Sept. 14, 1999 (Ex. C attached to SOR).) By contrast, Payne argues that Alternative 1 would adequately protect raptors during the critical nesting season, but have no detrimental impact on his property interest, since it would preclude only construction activity in the buffer zone and only during the nesting season (generally from February 1 through August 15 of each year).

[4/] While the State Director approved the Project, thus authorizing a maximum level of well drilling and associated development within the Project area, applications for permits to drill (APD's) for specific wells and applications for grants of rights-of-way to construct, operate, and maintain the natural gas transmission pipeline, as well as access roads and other related facilities, are subject to separate approval by BLM, following any required site-specific environmental review. (ROD at 2; I FEIS at 1–1 to 1–2, 1–5.)

[5/] Both the ROD and the FEIS expressly note that site-specific evaluation may allow modifications of this buffer restriction.

Counsel for BLM has moved to dismiss Payne's appeal on the ground he lacks standing because he is not adversely affected by the State Director's July 1999 ROD. (Answer at 9–12.) Payne's assertion that he is likely to be adversely affected by the State Director's July 1999 ROD is disputed by BLM, arguing that the potential impact of the more restrictive raptor protection measures on the ability of the lessees/ operators to drill wells on the leaseholds in which Payne has a royalty interest cannot be determined until after each lessee/operator has applied for an APD and BLM has decided whether to modify or even eliminate the year-long no surface occupancy buffer zone around an active raptor nest, in the case of a particular well site. Thus, BLM asserts appellant offers no reason to believe that, if the owner/operator applies and seeks a variance, the BLM will not grant it." [6/] (Answer at 10.)

[1] It is well settled that an appellant will be deemed to be adversely affected, within the meaning of 43 CFR 4.410(a), only where he demonstrates that he will, or is substantially likely to, suffer some sort of injury or harm to a legally cognizable interest. Donald K. Majors, 123 IBLA 142, 143 (1992); Storm Master Owners, 103 IBLA 162, 177 (1986). [7/] Further, the appellant must make colorable allegations of an adverse effect supported by specific facts to establish a causal relationship between the action to be undertaken, with BLM's approval, and the injury alleged. Colorado Open Space Council, 109 IBLA 274, 280 (1989). Ultimately, while the appellant need not prove that an adverse effect will, in fact, occur as a result of the BLM action, he must show that the threat of injury is real and immediate. Donald K. Majors, 123 IBLA at 144-45; see Laser, Inc., 136 IBLA 271, 274 (1996).

We find appellant has made a threshold showing that BLM's initial decision to preclude any well development and production activities in a ½-mile radius around active raptor nests may potentially prevent the drilling of a number of wells on the leaseholds, in which Payne has an overriding royalty interest. Thus, BLM specifically recognized in its FEIS, based on its 1998 raptor survey, that, owing to this policy, eight wells could not be drilled in the case of leases held by Chandler LLC, in which Payne holds an overriding royalty interest. (I FEIS at 2–40; see Chandler Affidavit at

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[6/] With respect to seasonal and year–long no surface occupancy buffer zones, BLM provided that they might be diminished or even eliminated in the case of particular nests, based on annual field surveys of nesting activity, where such action was deemed advisable given the status of the current use of the nest, the species involved, and the size and location of natural topographic barriers which might themselves provide an adequate buffer. (ROD at 7, Appendix 1; I FEIS at 2–39, 4–52, 4–57; II FEIS at F–31 to F–32.)

[7/] The regulation at 43 CFR 4.410(a) also provides that only a "party to a case" may appeal to the Board. Payne is a "party to a case" because he actively participated in the decisionmaking process leading to the ROD. See II FEIS at F-1, F-2; William E. Love, 151 IBLA 309, 319 n.2 (2000).

1–4 (plus, two additional wells may not be drilled, based on 1999 private raptor survey).)

While we recognize that fewer wells can be drilled on the affected leaseholds, we find no evidence that drilling and associated activity will be precluded entirely in the case of any leasehold. The State Director found to the contrary, and Payne does not contradict that finding. (ROD at 4 ("None of the Environmental Protection Measures would completely disallow lawful access to develop a Federal lease"); Payne Reply Brief, dated Dec. 20, 1999, at 7 ("The FEIS restrictions complained of will preclude a number of wells from being drilled, resulting in a reduced well density and reduced ultimate recovery of resource within each affected leasehold").) While it may turn out that all of the natural gas which would be produced absent BLM's adoption of the no surface occupancy buffer zone policy under Alternative 2 would also be produced under that alternative, the record does not support this assumption. [8/] Accordingly, BLM's motion to dismiss Payne's appeal is denied.

With respect to the merits of Payne's appeal, he argues that BLM adoption of Alternative 2 lacks a rational basis to the extent that it precludes wells and other long-term surface occupancy within ½-mile of any active raptor nest in the Project area, where that nest had been occupied within three years prior to the proposed activity. Payne contends that this decision is arbitrary and capricious since it is based on BLM speculation without citation to scientific support that absent the year-long protective buffer around nesting sites raptors may be adversely affected. (SOR at 8.) Appellant argues that the record discloses that the effects on special-status raptors in the south area of the Project which includes his properties is the same under Alternatives 1 and 2, citing I FEIS at Table 4–12. (SOR at 9.) Appellant Payne also contends that BLM has erroneously assumed that the authority to regulate ground-disturbing activities to protect raptor habitat is provided by the preclusion against takings in section 2 of the Migratory Bird Treaty Act (MBTA), as amended, 16 U.S.C. § 703 (2000), and section 1 of the Bald and Golden Eagle Protection Act (BGEPA), as amended, 16 U.S.C. § 668 (2000). (SOR at 10–12.) Payne further argues that incorporation of the United States Fish and Wildlife Service (FWS) guidelines [9/] in the FEIS violates NEPA because the guidelines were not included in the Draft EIS and, hence, the opportunity for public comment was not provided and because they have

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[8/] It cannot be said that Payne is not adversely affected by BLM's policy determination simply because the APD's are submitted by the lessees/operators rather than the holder of an overriding royalty interest.

[9/] The record contains copies of the August 1998 Draft Guidelines of the FWS entitled "Utah Field Office Guidelines for Raptor Protection Proximal to Disturbances from Land Use Activities." This was incorporated by reference in the FEIS. A copy of the final document, dated November 1999, entitled "Utah Field Office Guidelines for Raptor Protection From Human and Land Use Disturbances" also is part of the record.

not been promulgated pursuant to rulemaking procedures under relevant provisions of the Administrative Procedure Act (APA), 5 U.S.C. § 553 (2000). (SOR at 13–14.) Additionally, appellant Payne asserts that the buffer protection measures required by the ROD are excessive and constitute a taking of appellant's property in violation of the Constitution. (SOR at 15–16.) Appellant Payne also requests an award of attorney fees and costs under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (2000).

An answer has been filed by BLM contending that the relevant 1998 FWS guidelines for raptor protection provide a rational basis for imposition of a 1-mile buffer around peregrine falcon sites while maintaining a ½-mile buffer around other raptor sites, noting that FWS is the Department's primary expert in wildlife matters and that, absent a showing of error by a preponderance of the evidence, a difference of opinion will not overcome the reasoned opinions of the Department's technical experts. (Answer at 14.) Contending that it is obligated under the Federal Land Policy and Management Act (FLPMA), § 302(b), 43 U.S.C. § 1732(b) (2000), to prevent unnecessary and undue degradation of wildlife resources, BLM notes that this was an explicit basis for the choice of Alternative 2 cited in the ROD. (SOR at 15.) It is asserted by BLM that the de-listing of the peregrine falcon does not constitute the kind of new information which would require a supplemental EIS and undermine BLM compliance with NEPA. Id. Regarding the question of the authority provided by the MBTA and the BGEPA, it is pointed out by BLM that the relevant authority relied upon is that provided by § 302 of FLPMA. (Answer at 21-22.) Opportunity to comment on the FWS guidelines in compliance with NEPA was provided, BLM asserts, by publication of the FEIS/ROD with a 30-day review period. Id. at 22. Further, BLM denies that it was improper to consider the FWS guidelines in adjudi-cation of the Project proposal without promulgating a regulation incorporating the guidelines. Id. at 23. Finally, with respect to Payne's request for attorney fees and costs, BLM points out that authority for such awards is limited by EAJA to adversary adjudications required by statute to be determined on the record after an opportunity for an agency hearing, which was not the case here.

[2] A BLM decision approving, disapproving, or restricting drilling and other activity in the case of Federal oil and gas leases constitutes the exercise of the Secretary's discretionary authority under the Mineral Leasing Act, as amended, 30 U.S.C. §§ 181–287 (2000). Secretarial discretion to manage oil and gas activities on the public lands in the public interest extends not just to the initial leasing decision, but also to subsequent regulation of the manner and pace of development activities. See, e.g., Powder River Basin Resources Council, 120 IBLA 47, 54–55 (1991), citing Copper Valley Machine Works, Inc. v. Andrus, 653 F.2d 595 (D.C. Cir. 1981) and Union Oil Company of California v. Morton, 512 F.2d 743, 749–51 (9th Cir. 1975). A BLM decision approving an application for development of the public lands pursuant to the Secretary's discretionary authority will ordinarily be affirmed

by the Board when the record shows the decision is based on a reasoned analysis of the factors involved made with due regard for the public interest. See Cypress Community Church, 148 IBLA 161, 164 (1999) (right-of-way).

In its FEIS, BLM noted that 11 raptor species were known to occur within the Project area, of which 5 (golden eagle, ferruginous hawk, red-tailed hawk, prairie falcon, and peregrine falcon) were known to nest in the area and 3 (northern harrier, American kestrel, and great horned owl) were thought to probably nest in that area. (I FEIS at 3–71.) It also stated that, as a result of 1997 and 1998 aerial surveys, the presence of a total of 140 raptor nests had been documented in the Project area, or within ½-mile of its boundaries. Id.

After considering the potential impacts of the Project on raptors, BLM concluded that allowing construction and other temporary surface disturbances to occur during the nesting season within ½-mile of an active raptor nest has the potential, given the increased human activity and noise levels, to disrupt the activity of the nesting pair, including selecting and constructing a nest, breeding, laying eggs, and caring for their young, and may even cause them to abandon the nest (and perhaps their entire territory), thus resulting in the loss of their eggs and/or young. (ROD at 7; I FEIS at 4–51 to 4–52.) Further, while it appears that the greatest risk to nesting raptors and their eggs/young would be during the nesting season, and especially during the nest construction and egg-laying phases of that season, the risk continues through the remainder of the year, and stems not only from construction, but also from other human activity. (ROD at 7; I FEIS at 4–51 to 4–52, 4–57.)

Raptors may be deterred from nesting in areas where they have previously nested by human activity associated with the Project involving a continuing human presence, including well inspections and routine well maintenance (such as workovers or other activities involving noisy equipment) which occurs at other times of the year. Id. at 4–52. In addition, they may be unable to find any alternative nesting sites in the Project Area:

> An inherent problem with the seasonal buffer zone concept is that it only protects nesting raptors during the nesting season prior to or during the construction phase(s) of the project. Continuous protection of raptor nests and nesting habitat is not provided, since facilities may be constructed near formerly productive nests outside of the exclusionary period. Once facilities are established in an area, raptors may be deterred from using these nest sites again during subsequent breeding seasons. If the disturbance is sufficiently high, the birds may abandon their territory altogether. As adjacent habitats become increasingly fragmented due to concentrated well densities in portions of the Project Area, the availability of alternative nest sites could

> become limited. For these reasons, the implementation of temporal and spatial buffer zones alone[] may not be enough to sufficiently offset impacts to local raptor populations under [Alternative 1].

(I FEIS at 4–57; see ROD at 7; I FEIS at 2–20 to 2–21, 4–51, 4–52 ("The daily disturbance by the field personnel [outside of the nesting season] could prevent raptors from utilizing the established nest locations and raptors may abandon the nesting territory altogether"), 4–53 to 4–57.) Thus, expanding the preclusion of surface–disturbing activity beyond the nesting season serves not only to protect nesting pairs and their eggs/young, but also "nesting habitat," which is likely to be used in future seasons for nesting purposes. (I FEIS at 4–57.)

While appellant Payne challenges the scientific basis of the conclusions reached in the FEIS, it must be recognized that the FEIS itself is based on the professional opinions of various educated and experienced wildlife biologists. (See I FEIS at 7–1 to 7–3.) Further, in adopting the year-long ½-mile no surface occupancy buffer zone policy, it appears from the record that BLM relied on FWS' Draft Guidelines, which recommended that policy, in the case of most of the raptors at issue here, based on scientific research regarding the impact of human disturbances on raptors. (ROD at 7; I FEIS at 4–57; II FEIS at F–26, F–76; Draft Guidelines at 4–7, 10, 15–19, 24; see Final Guidelines at 1–2, 6–10, 14, 20–23, 29.) Those Guidelines stated:

> Declines of local and regional raptor populations can result from aborted or reduced nesting attempts, particularly when the disturbance is prolonged or permanent such as industrial and transportation developments or urban expansion. * * * Associated high noise levels and increased human activity may preclude use of otherwise acceptable raptor habitats. Areas with limited human access tend to exhibit higher nesting densities and higher [fledgling] success for raptors * * *.

(Draft Guidelines at 6–7; see Final Guidelines at 8–9.)

It is well settled that BLM is entitled to rely on the professional opinion of its technical experts, concerning matters within the realm of their expertise, where it is reasonable and supported by record evidence. See, e.g., Southern Utah Wilderness Alliance, 158 IBLA 212, 216 (2003) (impact of mineral materials site); West Cow Creek Permittees v. BLM, 142 IBLA 224, 238 (1998) (range carrying capacity); Yankee Gulch Joint Venture v. BLM, 113 IBLA 106, 129 (1990) (discovery of valuable sodium deposit); Western American Exploration Co., 112 IBLA 317, 318–19 (1990) (known geologic structure of producing oil or gas field); American Gilsonite Co., 111 IBLA 1, 31–33, 96 I.D. 408, 424–25 (1989) (workability of gilsonite deposit). A party challenging such reliance must show by a preponderance of the

evidence that the BLM decision is based on an error in methodology, data, and/or analysis. West Cow Creek Permittees v. BLM, 142 IBLA at 238; Western American Exploration Co., 112 IBLA at 318. A mere difference of opinion is not sufficient. Southern Utah Wilderness Alliance, supra. As the Supreme Court stated in Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989): "When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts." See Life of the Land v. Brinegar, 485 F.2d 460, 472 (9th Cir. 1973), cert. denied, 416 U.S. 961 (1974) ("disagreement among experts will not serve to invalidate an EIS"); Wyoming Audubon, 151 IBLA 42, 51 (1999) ("NEPA does not require * * * this Board to decide whether an EIS * * * is based on the best scientific methodology available or require us to resolve disagreements among various scientists as to methodology"). Appellant Payne has not offered any evidence to show that the BLM analysis was in error. [10/]

Payne's assertion that BLM has erroneously assumed that the authority to regulate ground-disturbing activities to protect raptor habitat is provided by the bar against takings in section 2 of the MBTA, 16 U.S.C. § 703 (2000), and section 1 of the BGEPA, 16 U.S.C. § 668 (2000), does not provide a basis for overturning the BLM decision. It is apparent from the record that the BLM decision is predicated upon its authority under section 302(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(b) (2000), to protect the public lands from unnecessary and undue degradation. No authority has been cited for limiting BLM discretion under FLPMA to protective measures mandated by other statutes. [11/]

[10/] In the EIS for the Project, BLM considered the potential impact of the alternatives on special-status species under the Endangered Species Act of 1973 (ESA), as amended, 16 U.S.C. §§ 1531–1544 (2000). Appellant cites the results of this study (I FEIS at Table 4–12) in arguing that Alternative 2 makes no difference on the impact to special-status raptors and their habitat. We recognize that BLM's decision to adopt the more restrictive raptor protection provisions of Alternative 2 was guided by concern for nesting raptors, whether or not they are special-status species (such as the bald eagle, peregrine falcon, northern goshawk, ferruginous hawk, and northern harrier). The fact that when BLM assessed the impact of Project activities in terms of the requirements of the ESA it found there was unlikely to be an adverse impact on individuals of such species or their habitat, regardless of whether it adopted Alternative 1 or Alternative 2, does not establish the absence of adverse impacts to raptors or raptor habitat.

[11/] Payne's argument that BLM's decision to preclude well development and other long-term surface occupancy year long within 1 mile of any active peregrine falcon nest is arbitrary and capricious because the peregrine falcon has now been de-listed under the ESA must also be rejected. Although the FWS guidelines did distinguish between listed and unlisted in recommending a 1-mile buffer for the former as

(continued....)

Appellant Payne has also contested BLM reliance upon the FWS guidelines because they were not included in the DEIS and thus interested parties were allegedly deprived of the opportunity to comment on the applicability of the guidelines. In a related challenge, he argues that reliance upon the guidelines is improper in the absence of their promulgation as a regulation pursuant to notice and comment rulemaking provisions of the APA. While the Draft Guidelines were expressly incorporated for the first time in the FEIS, we find no violation of section 102(2)(C) of NEPA, or its implementing regulations. When an EIS is prepared, public involvement in the environmental review process is generally required by the statute, since one of the principal statutory aims is to promote informed public participation in the agency decision-making process. State of California v. Block, 690 F.2d 753, 761, 770–71 (9th Cir. 1982). We find that this objective has been satisfied in this case. While not expressly identified in the Draft EIS as having been derived from the Draft Guidelines, the no surface occupancy buffer zones which were influenced by the Guidelines were first proposed as a part of the environmental protection measures for Alternative 2 in the Draft EIS. (See I DEIS at 2–38; II FEIS at F–26 ("The [Interdisciplinary Team] considered the proposed guidelines (USFWS 1998b) in the impact analysis and developed specific environmental protection measures that address these guidelines"), F–76.) Thus, the public had adequate notice of BLM's proposal to implement these measures, and was afforded the opportunity to comment on them.

Appellant's contention that the guidelines were required to be promulgated in accordance with the rulemaking provisions of the APA raises the issue of the status of the guidelines themselves. We do not read the guidelines as binding in the context of this case on either BLM or this Board in adjudicating the Project application. [12/] The preface notes that the "guidelines are intended to provide an advisory framework for consistent raptor management approaches statewide." (Utah Field Office Guidelines for Raptor Protection From Human and Land Use Disturbances (November 1999) (hereinafter cited as FWS Final Guidelines) at 1.) However, the drafters recognized that the recommended buffers represent optimal stipulations, are not site specific to proposed projects, and that land use planners should evaluate the type and duration

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[11/] (...continued)
compared with a ½-mile buffer for the latter, see FWS Final Guidelines at 22, BLM did not rely on the ESA, but rather on § 302 of FLPMA as authority for its raptor protection alternative. See note 9, supra.

[12/] In this respect, the guidelines are properly distinguished from a biological opinion issued by FWS in response to a consultation initiated pursuant to Section 7 of the Endangered Species Act, 16 U.S.C. § 1536 (2000), when BLM finds that a proposed action may affect a protected species or its habitat. See Sierra Club, Angeles Chapter, Santa Clarita Group, 156 IBLA 144, 164–65 (2002).

of the proposed activity and other factors when determining site-specific buffers. Id. at 20. Further, not "all recommendations are intended to be incorporated on every proposed project." Id. at 27. It is apparent from the discretion BLM left itself to grant variances from the buffer zone that BLM did not consider itself precluded from altering the buffer. Accordingly, we find the guidelines, unlike regulations, do not constitute rules of law binding on BLM and this Board. See Mobil Producing Texas & New Mexico, Inc., 115 IBLA 164, 169 (1990). Consequently, the assertion of a violation of the rulemaking provisions of the APA must be rejected.

Appellant Payne further argues that BLM's adoption of the no surface occupancy buffer zone policy (in the case of active raptor nests) has resulted in a regulatory "taking" of his private property interest contrary to the Fifth Amendment to the U.S. Constitution. As a threshold matter, we note that this Board, as a quasi-judicial body within the Department of the Interior and the Executive Branch of the Government, is without jurisdiction to find a statute or implementing regulations duly promulgated by the Department unconstitutional. See Laguna Gatuna, Inc., 131 IBLA 169, 173 (1994); Phillips Petroleum Co., 116 IBLA 152, 156 (1990); Andy D. Rutledge, 82 IBLA 89, 91 (1984). We point out, however, that any assertion of an unconstitutional taking is premature in the absence of the filing of an APD within the buffer zone. The BLM ROD and FEIS explicitly recognize that APD's will be adjudicated on a case-by-case basis and that exceptions to the buffer zone may be granted. Accordingly, appellant's constitutional argument must be rejected. [13/]

Finally, we turn to the appeal by Leader, a property owner and part-time resident of the Town of Kenilworth, Utah, situated in the northern part of the Project Area. He challenges the State Director's July 1999 ROD on the basis that BLM failed to consider the potential impact of the Project on the right-of-way which carries the water, sewer, telephone, electrical power, and cable television lines across the northern part of the Project area to his house, near Kenilworth. He argues that this is especially important because BLM has, as a consequence, failed to consider the likely impact resulting from the fact that two proposed well sites are situated "directly on top of our right-of-way * * * [including] our culinary water line and the rest of our utilities." (Leader SOR.)

[13/] Payne asserts that, "upon * * * prevailing" in his appeal, he should be awarded attorney's fees and other expenses under EAJA, as amended, 5 U.S.C. § 504 (2000). (SOR at 17.) Since he has not prevailed before the Board, no award is warranted. Moreover, we note that, since this case did not constitute an "adversary adjudication" because it was not "required by statute to be determined on the record after opportunity for an agency hearing," 5 U.S.C. §§ 504(b)(1)(C) and 554(a) (2000), Payne would not be entitled, under any circumstances, to an award under the EAJA and its implementing regulations, 43 CFR 4.601 through 4.619. See James A. Simpson, 136 IBLA 77, 83 (1996).

Although the FEIS does not refer, either in its narrative text or appended maps, to the right-of-way running across the Project area to Leader's house, near Kenilworth, it must be recognized that the depiction of the well sites is a rough approximation of the location of the sites, given the scale of the map. (See I FEIS at 3–100 to 3–101; II FEIS at Plate 3–7 (Land Use).) The FEIS contains a map depicting the location of proposed wells in the case of Alternative 2 (II FEIS at Plate 2–4 (Alternative 2)), which shows two wells southwest of Kenilworth, in the position generally described by Leader. (See Leader SOR ("If you want to know where our right-of-way is just refer to any of the plate maps [in the FEIS]. Find Kenilworth in the North Area, going down and to the left of Kenilworth are two proposed well sites * * * directly on top of our right-of-way."))

The exact position of the wells and related facilities will be determined by BLM, only upon submission by the lessee/operator of an APD and further decisionmaking by BLM, following site-specific environmental review. (ROD at 2; I FEIS at 1–5; see ROD at 8 (incorporating 43 CFR 3162.3-1 and 3162.5-1(a)).) At that time, BLM has provided that it will consider the site–specific impacts of each well, including ensuring that any right-of-way situated in the vicinity of the proposed site and other Project activity is protected: "All well * * * locations on public lands and/or Federal mineral estate[s] * * * will be adjusted[] to * * * minimize impacts to the environment and other resources[.]" (ROD at 2 (emphasis added); see ROD at 8 (incorporating 43 CFR 3162.5-3 ("The operator shall take all precautions necessary to provide * * * the protection of property")); I FEIS at 1–5 ("After the site inspection, the APD may be revised or site–specific mitigation may be added as Conditions of Approval of the APD for protection of surface and/or subsurface resource values near the proposed activity. These may include adjusting the proposed locations of well sites * * * [and] identifying the construction methods to be employed[.]")) Leader has failed to show any error.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge